No. 14417

IN THE

United States
Court of Appeals
For the Ninth Circuit

C. W. CAYWOOD,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE

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Resisting Appeal from the United States District Court
District of Arizona

JURISDICTIONAL MATTER

Appellant in his brief has correctly stated the jurisdictional matters, and Appellee agrees that the District Court had jurisdiction under Title 18 U.S.C., Section 3231, and that this Court has jurisdiction under Title 28 U.S.C., Section 1291.

STATEMENT OF FACTS

The Statement of Facts in Appellant's Opening Brief is substantially correct, but incomplete. Appellee for this reason makes a more detailed statement.

At the outset Appellee does wish, however, to correct one false impression left with the Court. Appellant, on page 3 of his brief, lifts out of context a question put

to the Government witness Simonian, and his answer thereto, namely:

"Q. Now you advised him (the Appellant) that if he could not get rid of this property to sell it?

A. Well, I might have, yes."

An examination of the record (T.R. 106, 107, 108), discloses that the witness was then testifying and had been testifying in generalities concerning the defendant Caywood and the operations of the state Agency in the State of Arizona, and when the witness was asked the question pertaining to *this property* the reference was not made to the property involved in this case, but to the property stored in the State of Arizona for distribution.

The DP-2 application itself provided:

"If prior to distributing the requested property it is determined that there is no need for all or any part of the property received, this fact will be communicated to the Office of Education, Federal Security Agency, Further, the applicant agrees that if requested he will return at his own expense to the source from which donation was made all property which it does not distribute to be placed in use.

"The property not distributed or reallocated within the state and property which has no further value for educational purposes will be reported to the Field Representative Office of Education, Federal Security Agency."

The Field Representative of the Office of Education, Government witness Simonian testified on direct examination that he had not at any time authorized the disposal of any of the items with which we are concerned in this case to anyone other than an eligible educational institution, (T.R. 101, 102).

The witness Simonian did testify, however, that he had discussed the disposal of salvage with the defendant Caywood and the witness had advised the defendant Caywood that a sale could be held for salvage in accordance with the procedures in the manual (T.R. 100).

To leave an impression with the Court that the defendant Caywood had been advised by the Government that he could sell the property we are concerned with in this case is to mislead the Court by lifting a question and answer out of context and torture its true meaning.

This case arose out of the administration of Title 40 U.S.C. 484 and essentially paragraph (j)(2) thereof, which concerns the allocation of Government surplus property that is usable and necessary for educational purposes or public health purposes, to eligible donees.

The Appellant C. W. Caywood was one of two defendants tried on two separate indictments which were consolidated for trial. *The other defendant, Harry Tompkins, does not join in this appeal.*

One indictment, identified as No. C-11,424 - Phx. charged the defendants with embezzlement of property of the United States of America in violation of Title 18, U.S.C. 641. At the close of the evidence offered by the Government the Trial Court dismissed this indictment on the motion of the defendants upon the ground that the property in question ceased to be the property of the United States of America (T.R. 415).

The other indictment, identified as No. C-12,219-Phx., charged the defendants with conspiring (Title 18 U.S.C. 371) to violate the laws of the United States by making false statements in violation of Title 18 U.S.C. 1001, and subverting the functions of the Government by depriving the United States of its right to have donable surplus property distributed to eligible educational in-

stitutions in violation of Title 40 U.S.C. 484; and embezzlement of property of the United States in violation of Title 18 U.S.C. 641.

At the close of the evidence offered by the Government the Trial Judge withdrew from the consideration of the jury the portion of the indictment charging the defendants with the embezzlement of Government property (violation of Title 18 U.S.C. 641), and that portion of the indictment was deleted by the Clerk at the direction of the Trial Judge (T.R. 438).

The jury was left to consider, therefore, only indictment No. C-12,219-Phx. and just the portion thereof that charged the defendants with conspiring to defraud the United States in violation of Title 18, U.S.C. 1001 and Title 40, U.S.C. 484.

The defendant C. W. Caywood was Assistant Superintendent of Public Instruction for the State of Arizona from January 24, 1949 (T.R. 87 and Govt. Ex. No. 7) to January 25, 1951 (T.R. 88 and Govt. Ex. No. 8) and was recognized by the Government to be the person responsible for the distribution of surplus property in the State of Arizona. (Govt. Ex. No. 3).

The defendant Harry Tompkins was a Deputy Collector of Internal Revenue for the District of Arizona (T.R. 371).

The United States Office of Education provided a form identified as DP-2 which was used by a state in making application for United States Government surplus property to be used by qualified educational institutions (T.R. 83, 88, 89, 91; Govt. Exs. 1-a, 1-b, 1-c, 1-d and 1-e).

The defendant C. W. Caywood made application on DP-2 forms to the United States Office of Education

in Los Angeles, California (T.R. 98, 113, 115; Govt. Exs. 1-a, 1-b, 1-c, 1-d and 1-e.

Some DP-2 forms bore Caywood's signature, others bore his name placed there by his employees at his direction (T.R. 113, 115, 122, 123, 125 and 129).

The DP-2 forms contained three certifications, two of these we are not concerned with here. The certification we are concerned with appears above the name C. W. Caywood. This is the certification made by the representative of the State Educational Agency and is the middle column found at the bottom of the first page on the DP-2 form (Govt. Exs. 1-a, 1-b, 1-c, 1-d and 1-e) and contains seven representations. We are essentially concerned with the representation found under paragraph 2 which states: "The property requested will be distributed to eligible educational institutions for educational purposes on the basis of need and utilization."

The practice of the Los Angeles field representative of the Office of Education was to send lists of available federal surplus property to the representatives of State Departments of Education (T.R. 88, 108, 109).

When the state determined it had need for any of the property contained in such a list for the schools within the state, the State Department of Education would make an application on the DP-2 form accompanied by a list of the property desired. The field representative of the Office of Education in processing this form would countersign the same for the Government and would then forward the application to the installation, or installations, which had the property applied for by the state. The next step was between the Government installation where the property was located and the state agency in arranging for the moving of the property (T.R. 88, 89).

The state agency was, in effect, the distribution center of surplus property for the schools of the state (T.R. 88, 96 and 97).

The evidence in this case is largely documentary and begins with the DP-2 forms and accompanying papers. The Government Exhibits, numbering 104 in all, traced the equipment applied for by C. W. Caywood into the hands of the persons who purchased it, and traced the money received for said property into the hands of the defendants Caywood and Tompkins.

The Exhibits in this case, except for two, were not reproduced and made a part of the printed transcript of record, for the reason that counsel believed it would be of doubtful assistance to the Court to do so. The Government Exhibits are, however, a part of the Record on Appeal and are available to the Court.

The Government Exhibits are the evidence establishing the 39 overt acts in the indictment and concern the property described there as well as one other item. They trace the property from the Government installations into the State of Arizona and into the hands of purchasers. They also trace the money into the hands of the defendants.

There is no dispute that the property involved was Government property; nor is there any dispute as to the procedures in obtaining the property from the Government. For these reasons much of the evidence in the case need not be dwelt on here.

It is interesting to note in tracing the items of property we are concerned with here that the defendants in many instances used two cloaks to conceal their operations. One is a machinery dealer at Phoenix, Arizona, where most of the equipment was repaired and where most of it was sold. The entree there was through an

uncle of the defendant Tompkins (T.R. 217, 224). The other was a lawyer and brother-in-law of the defendant Tompkins. The latter handled the proceeds of many sales by the maintenance of a special bank account (T.R. 329-365).

Specifically, the property with which we are concerned in this case is: (1) a Quickway Truck Mounted Crane referred to in overt acts 1-4 in the indictment, (2) an International Harvester Tractor referred to in overt acts 5-8, (3) an International Harvester Tractor referred to in overt acts 9-12, (4) An International Harvester Tractor referred to in overt acts 13-16, (5) a Northwest Shovel referred to in overt acts 17-21, (6) a Northwest Shovel referred to in overt acts 22-25, (7) Miscellaneous Tractor Parts referred to in overt acts 26-34, (8) Schramm Generating Set and Vulcanizing Mold referred to in overt acts 36-38, and (9) a Road Grader not alleged in the indictment.

A factual recital of the details pertaining to the acquisition of each of the above pieces of equipment and the disposition thereof would be repetitious, wearisome and of doubtful help to this Court. This is so because the facts in each instance follow a definite pattern. Appellee, therefore, will trace these steps in the body of its brief only so far as the Quickway Truck Mounted Crane referred to in overt acts 1-4 in the indictment is concerned.

This piece of equipment was applied for on DP-2 form (Govt. Ex. 1-e) which has typed upon its face, "This property will be used for maintenance in a school" and accompanying papers. It is further identified in the way bill addressed to the Arizona State Educational Agency for Surplus Property, Govt. Ex. 43-A, and the freight bill was paid for by check signed by

Caywood, Govt. Ex. 11. In Govt. Ex. 11 is a typed memo, "This equipment with the exception of one or two items has already been assigned", and bears the initials, "C.W.C.", which are the defendant Caywood's. The property was unloaded on New Year's Day in 1950 and taken to the defendant Tompkins' ranch (T.R. 208, 209). It was later taken from Tompkins' ranch to State Tractor & Equipment Company (T.R. 257) and was repaired there, Govt. Exs. 57, 58, (T.R. 259). It was sold for the defendants Caywood and Tompkins by a man named Schawver (T.R. 285, 286) and the buyer paid $5,000.00 for it, final payment being in the form of a check, Govt. Ex. 81 (T.R. 294) and the defendant Tompkins gave him a bill of sale, Govt. Ex. 82. (*The remaining pieces of equipment are traced and set forth in the Appendix,* in the event the Court is interested.)

It is apparent from the evidence as it unfolds that the defendant Caywood did not play an active part in the disposition of the equipment which he had applied for, and had shipped into the State of Arizona. The only instance in which he talked with a proposed buyer was with the Government's witness Haggard, who happened to be an uncle of the defendant Tompkins (T.R. 218).

On one occasion the defendant Caywood told the witness Haggard "to make a list of any stuff I wanted and he would try to get it." (T.R. 222).

Either the defendant Tompkins or the defendant Caywood asked the witness Haggard if he would be interested in selling any of the equipment on a commission basis (T.R. 222).

All of the other contacts with proposed buyers or persons contacted for the sale of the equipment with

which we are concerned in this case were made by the defendant Tompkins. That was the role he was to play in the conspiracy. He also had a ranch which provided a convenient place for the equipment to be stored, and frequent references are made in the Transcript of Record to equipment being at the ranch. A few are T.R. 209, 219, 249, 322.

The defendant Caywood and the defendant Tompkins were frequently seen together at the warehouse where the surplus property was stored. None of their conversations were overheard, because the Government witness Mosher said, "They usually were at the other end of the warehouse where I did not hear what they had to say," (T.R. 143).

The evidence that welds the two defendants inseparably together is the sharing of the proceeds of the sales. The bank account maintained by Z. Simpson Cox (the lawyer brother-in-law of Tompkins) makes it crystal clear. The testimony of Z. Simpson Cox (T.R. 329-367) together with Govt. Ex. 92, which is a photostatic copy of the ledger sheet for the account maintained by him for the defendant Harry C. Tompkins, trace the deposits and the withdrawals in detail. Many of the checks were made to cash, because the defendant Caywood stated he did not wish any further checks (T.R. 350). There were some checks, however, made out to Caywood from this bank account, one of which is Govt. Ex. 94 in the some of $1,000.00 which bears the endorsement of C. W. Caywood and was cashed by him (T.R. 345, 347). Another such check is Govt. Ex. 93. This is a check in the sum of $450.00 deposited to the account of C. F. or Cathryn B. Caywood (T.R. 348, 349).

On one occasion Z. Simpson Cox stated that the defendant Tompkins had explained to him that cash

amounts were being paid to Caywood, and Cox told the defendant Tompkins that he should make payments to Caywood by check to have a record, and that is how the $1,000.00 and $450.00 checks came to be made (T.R. 347).

There is no evidence in the case refuting the fact that both defendants participated in the receipts of the sales of the property. Indeed there could not be.

As is not uncommon, wrongdoers frequently have differences of opinion as to the division of the proceeds. That was true in this case.

The Government witness Porter in his testimony discloses that he was hired by Z. Simpson Cox to make a recap on the account; that is how a disclosure came to be made as to the gross amount received by Mr. Tompkins and the gross amount paid to Mr. Caywood; and the defendants accepted his findings (T.R. 367, 373).

Mr. Porter's recollection was that approximately $10,000.00 had been paid by Mr. Tompkins to Mr. Caywood (T.R. 369). His memory was good as disclosed by Govt. Ex. 104 hereinafter described.

The Government witness Cox testified on cross examination that some time in April, 1951 he had a conversation at the home of the witness Porter, and the defendants Tompkins and Caywood were both present, (T.R. 362, 363). Cox stated that the purpose of the conversation was to determine for income tax purposes what Caywood had received in the way of commissions, and Cox stated that Caywood had received $10,000.00 from Tompkins, (T.R. 363).

The Government witness Coombs (T.R. 373, 378), a Certified Public Accountant, prepared the amended 1950 income tax return for the defendant Caywood (T.R. 375). He said that in May of 1951 he received

from the defendant Caywood a slip of paper containing some figures which he understood were commissions (T.R. 374, 375) Govt. Ex. 104. It is more than coincidence that the figures set forth in Govt. Ex. 104 tie in perfectly with the Z. Simpson Cox bank account, and to go back to witness Porter, it totals $10,011.57. Cox confirmed the figures (T.R. 359).

Govt. Ex. 93, the check to C. W. Caywood in the sum of $450.00, dated August 1, 1950, is set forth in Govt. Ex. 104 on that date and for that amount. Govt. Ex. 94, the check to C. W. Caywood in the sum of $1,000.00 dated May 13, 1950 falls into the proper place in Govt. Ex. 104. The same is true of the checks which were made to cash. For example, the witness Cox (T.R. 334) described a check in the sum of $800.00 dated February 18, 1950, Govt. Ex. 97; it heads the list on the correct date in Govt. Ex. 104. The same is true as to Govt. Ex. 96. Govt. Ex. 100 is a check to First National Bank of Arizona dated March 31, 1950 in the sum of $1,285.25, and Govt. Ex. 101 is a check to Valley National Bank dated March 25, 1950 in the sum of $742.82—they too appear in Govt. Ex. 104 on the right dates and in the right amounts. The witness Cox endorsed this latter check and got cash for it (T.R. 339). Cox said he talked with Caywood in 1951 about these checks (T.R. 340). Govt. Ex. 95, the check to cash in the sum of $1,000.00 dated April 8, 1950 finds its proper place and amount in Govt. Ex. 104.

It hardly seems necessary to outline the deposits in the account kept by Cox, but it can be done from his testimony and that of other witnesses. The deposits are in accord with many of the sales we are concerned with here. For example, the $3,000.00 received by Tompkins for tractor parts from State Tractor & Equipment Company is there (T.R. 332). The State Tractor & Equip-

ment Company check in the sum of $6,500.00 received by Tompkins for the Northwest Shovel sold to San Xavier Rock & Sand Company (T.R. 344) was deposited there. The check for $6,875.55 received by Tompkins from Johnson for the tractor which was sold to Mr. Tomison also is deposited there (T.R. 352). Govt. Ex. 76, the check from State Tractor & Equipment Company in the sum of $1,150.00 given to Tompkins for the road grader (see picture Govt. Ex. 44) is deposited there (T.R. 336). Govt. Ex. 92 (Cox's ledger sheet) binds Caywood to these sales, and Govt. Ex. 104 (Caywood's list of commissions for 1950) is a further confirmation of Caywood's participation and an admission against interest.

ARGUMENT

Appellee assumes appellant has abandoned Points 1, 3, 4, 5 and 8 to 11, both inclusive, contained in his Statement of Points found in the Transcript of Record at pages 458-460, since he has confined his argument in his brief to points 2, 6 and 7 thereof. This Court may disregard the points not argued in appellant's brief. *Forno vs. Coyle,* C.A.A. 9, 75 F. 2d. 692, 695.

In answering appellant's argument we will discuss the Specifications of Error in the order in which they are presented in appellant's brief.

SPECIFICATIONS OF ERROR I

The prosecution was barred by the Statute of Limitations and the Court erred in refusing to dismiss the indictment.

The Government concedes that Title 18 U.S.C. 3282 is the Statute of Limitations that applies to this case, and that the limitation imposed therein is three years from date of the commission of the offense to the date on which the indictment is found.

The Government also concedes the well established rule that in conspiracy the Statute of Limitations begins to run from the last overt act done to effect the object thereof.

Appellant in his brief has failed to correctly state the charge made against the defendants in the indictment. It is found in the Transcript of Record at pages 3 to 16, and in short, says that from April 20, 1949 to the date of the indictment (January 18, 1954) the defendants conspired to commit offenses against the United States of America and defraud the United States of America, and that the statutes violated were 18 U.S.C. 1001 and Public Law 152, 81st Congress (40 U.S.C. 484).

There is but one conspiracy alleged and the object thereof was to thwart the distribution of Government surplus property to eligible schools. The overt acts—39 in all—were to effectuate that object. The ultimate purpose of the conspirators was undoubtedly to obtain money from the sale of the property intended by the Government to be used by eligible schools.

Appellant takes the position that the conspiracy was ended with the filing of the false statements, and since they were all filed more than three years before the indictment was found, the defendant Caywood was saved by the Statute of Limitations.

The difficulty with this premise is that appellant ignores the violation of 40 U.S.C. 484 and the object of the conspiracy. He also ignores overt acts 12, 16, 21, 31, 33, 35 and 39 which were well within three years before the indictment was returned, and appellant is named in all of them.

The conspiracy did not end with the filing of the DP-2 applications as appellant contends, but on the

contrary began with their filing. There were other things done to effect the object of the conspiracy and more than one of them was done within the three year period. All the acts done and performed either in California or Arizona regarding the property we are concerned with here were in furtherance of the object of the conspiracy.

Appellee readily admits the rule taken from *Hall vs. U. S.*, 109 F. 2d. 976, 984, that "The overt act must be a subsequent independent act following the conspiracy and done to carry into effect the object thereof, and cannot suceed the completion of the contemplated crime".

The language in the indictment found in paragraph 2 at page 5 in the Transcript of Record spells out the object of the conspiracy in these words:

> "That the defendants, conspired, confederated, and agreed together to defraud the United States of America, and the agencies thereof, by depriving said United States of its right, under the laws and regulations appertaining to the disposal of donable surplus property of the United States to have all of such property disposed of according to the applicable laws and regulations and to defraud the United States by preventing it from distributing its surplus property to eligible educational institutions, and to defraud the United States by diverting and converting its donable surplus property from eligible educational institutions for which allocated to the use of said defendants and others."

When appellant contends, as he does in page 13 of his brief, that under conspiracy to defraud the United States the last overt act would occur when the last piece of equipment acquired in pursuance of the conspiracy was converted to defendants' use, he appears to be thinking in terms of a charge of conversion. That charge was removed from this case (T.R. 415).

The appellant Caywood was very definitely a part of the conspiracy to defeat the operation of 40 U.S.C. 484 and the last acts he performed to that end were to receive money when the property passed into the hands of purchasers (overt acts 29, 31, 33, 35 and 39) rather than to eligible schools as the law intended, "and so long as the partnership in crime continues, the partners act for each other in carrying it forward" *Pinkerton vs. U. S.,* 328 U. S. 640, 646.

The acts performed by Caywood subsequent to the filing of the DP-2 forms were a continuation of the conspiracy. It does not matter that some acts violated one statute and other acts violated another. "The conspiracy is the crime, and that is one, however diverse its objects." *Frohwerk vs. U. S.,* 249 U. S. 204, at page 210.

Appellee fails to see the application of *Bridges, et al. vs. U. S.,* 346 U. S. 209 to the case at hand. The question presented there was whether the general three year Statute of Limitations was suspended by the Wartime Suspension of Limitations Act in relation to the offenses charged in the indictment.

The Court merely stated that the proof did not support the Government's contention that Count I was in fact a conspiracy to defraud the United States even though language in the indictment was framed in words to that effect.

Appellee submits that the Statement of Facts in this case bears out the charge of defrauding the Government by depriving it of its right to have donable surplus property disposed of in accordance with 40 U.S.C. 484.

SPECIFICATION OF ERROR NOS. II AND III

It is an error for the Court to fail to instruct the jury that wrongful intent is an element of conspiracy and must be established in order for the jury to find defendants guilty.

Appellant contends that the Court failed in its duty to properly instruct the jury as to the elements constituting the crime of conspiracy in that the elements of intent and knowledge were omitted from the Court's instruction. There is ample authority that intent and knowledge are necessary elements of the crime.

U. S. vs. Falcone, 311 U. S. 205

Craig vs. U. S., 9th Cir., 81 F. 2d. 816, 822

Mazurosky vs. U. S., 9th Cir., 100 F. 2d. 958

Marino vs. U. S., (C.C.A. 9th) 91 F. 2d. 691, 696; certiorari denied 302 U. S. 764

and it was the duty of the Trial Court to properly instruct the jury as to the elements constituting the crime of conspiracy, *Butler vs. U. S.,* 197 F. 2d. 561, 564.

Appellee takes issue with the statement that the Court gave no instructions relating to intent or knowledge. The instructions are found in the Transcript of Record at pages 438 to 446, both inclusive, as well as the Appendix in appellant's brief.

It is not helpful to single out portions of an instruction since they must be construed as a whole. *Benatar vs. U. S.,* 9 Cir. 209 F. 2d. 734; *Graham vs. U. S.,* 120 F. 2d. 543. With this reservation in mind the following paragraphs of the instructions found at pages 439 to 440 T.R. are set out below:

"Now conspiracy is a combination and agreement by two or more people to do something wrong. In this particular case, the matter has now been reduced to this charge, that these defendants conspired to defraud the United States Government.

"It is charged that they joined together in a mutual enterprise knowingly and criminally and with the full understanding on the part of each other of what they were doing; that they joined together in a scheme to get this Federal surplus property over here to Arizona and make personal use of it. Instead of allowing it to pursue the correct proper course of being distributed to the Arizona schools and schools districts, the school system of Arizona."

This Court in *Craig vs. U. S.,* 81 F. 816, 822 had occasion to go into the subject of knowledge on the part of a conspirator and concluded as did the Court in *Marino vs. U. S., Supra,* 696 that "He must know the purpose of the conspiracy* * *".

Ordinarily intent will be inferred from the nature of the combination. *Landen vs. U. S.,* 299 F. 75. Further expression to the same effect is found in *Stone vs. U. S.,* 113 F. 2d. 70 at page 75:

"Where guilty knowledge is an element in the offense, as in conspiracy charges and the use of the mails to defraud, the knowledge must be found from the evidence beyond a reasonable doubt, but actual knowledge may be inferred. Scienter may be inferred where the lack of knowledge consists of ignorance of facts which any ordinary person under similar circumstances should have known."

The Court in *McGregor vs. U. S.,* 134 F. 187, at page 197 gives us further light on intent when it says:

"It is well settled that the law presumes that every man intends the legitimate consequences of his own acts, and that such acts, when knowingly done, cannot be excused on the ground of an innocent intent. In

both civil and criminal cases the intent with which an act is done is inferred from the result of the act itself, and the law presumes that every man intends the legitimate consequence of his own acts."

The Court undoubtedly had this in mind when he instructed:

"In other words, that the defendant Caywood was in an official position as assistant superintendent of public instruction where he was the authorized officer under the Arizona laws and was so recognized by the Federal Government, to apply to the various Federal authorities for allocation and shipment over here of various pieces of surplus property. And, of course, it was his duty then, after it got here, to see that it was applied to the uses for which the Federal Government sent it under the Federal statutes over here for educational purposes." (T.R. 439)

We are not left to speculate as to what constitutes an adequate instruction on the factors present in conspiracy. The Court in *Butler vs. U. S.*, 197 F. 2d. 561 at page 564 tells us:

"The trial court correctly told the jury the factors that must be present to constitute a conspiracy. It told the jury that 'The crime of conspiracy is two or more persons combining or confederating with the purpose of committing a public offense.' This would inform any person of ordinary intelligence that to be guilty more was required to make one a conspirator than mere innocent association with one, although knowing that such a one was engaged in unlawful activities. It is only when he associated with the conspirator for the purpose of committing a public offense that he becomes a member of the conspiracy. We think the trial court's instructions were adequate and fully advised the jury as to what it must find in order to find appellant guilty of the offense of conspiracy."

The Trial Court in the case at hand went much farther. This Court in *Carrigan vs. U. S.,* 9 Cir. 197 F. 2d. 817 approved of an instruction in a criminal conspiracy and the instructions are there set forth in full.

Appellee submits that it is a matter of opinion whether those instructions are more adequate on intent and knowledge. Indeed this Court need not draw comparisons. It need only decide that the essential elements of conspiracy were defined in this case, so that the rights of the defendants were well guarded in every essential respect, and no jury of average intelligence could have been misled. Appellee submits that the instructions correctly stated the law.

It is not of moment that the Court in another case emphasized to appellant's satisfaction the elements of knowledge and intent. Appellee might with equal logic complain that the Court did not instruct the jury that "conspiring to defraud the United States is in itself inconsistent with an honest purpose." That is what the Court said in *Razete vs. U. S.,* 199 F. 2d. 44, 50.

We must determine if the instruction given measures up to the norm. That is the test. Judge Lemon recently said:

> "The norm that should be applied to instructions has been repeatedly indicated by this Court. In Barcott v. United States, 9 Cir., 1948, 169 F. 2d. 929, 932, certiorari denied, 1949, 336 U. S. 912-913, 69 S. Ct. 602, 93 L. Ed. 1076, Judge Orr said:
>
> > 'Complaint is made of certain instructions requested by appellant and refused, and of certain instructions given by the Court. The alleged errors are said to be found in the language employed in certain instructions and of language omitted in other instructions.

> 'Detached paragraphs, sentences and phrases are emphasized and singled out. We have examined the charge given by the Court as a whole and find that it fully and fairly presents the law of the case.' "

Benatar vs. U. S., Supra, 743.

Appellant says that the Court erred in not giving instructions requested. The appellant Caywood did not submit any instructions to the Court. It is true that defendant Tompkins (who does not join in this appeal) did. It is also true that Caywood joined in the objections Tompkins made as to the instructions given (T.R. 448). There is at best doubt that the defendant Caywood availed himself of the benefit of Rule 30 of the Rules of Criminal Procedure for the District Courts.

Tompkin's objections joined in by Caywood stated (T.R. 447) that the propositions submitted were necessary so that the jury might properly relate the charge to the facts, and as the facts relate to Tompkins (T.R. 448). Thus the objections made at the trial joined in by Caywood are at least abortive and certainly inconsistent with the argument now made that the requested instructions were "stock". A "stock" instruction does not relate to specific persons or specific facts. It is equally true that a "stock" or "fundamental" instruction should be given regardless of a proper request or objection. *Benator vs. U. S., supra.*

Regardless of whether a request need be given for the proposed instructions, appellee submits that an examination of the complete instructions given discloses that the proposed ones on knowledge and intent were in substance given, and measure up to the test. *Benatar vs. U. S., supra.*

SPECIFICATION OF ERROR NO. IV

An instruction that "any improper interference with the United States Government in the discharge of the activities is deemed to be a fraud on the Government" is erroneous and is prejudicial partcularly where the Court does not instruct the jury that in order to constitute fraud there must be some evil or dishonest or wrongful intent.

The subject of intent in conspiracy has been dealt with in this brief under Specifications of Error Nos. II and III.

An attempt is made by appellant to lift a phrase from the instruction given, isolate it from the rest, and then conclude that "the Court actually inferred to the jury that it was not necessary that criminal intent be established."

Appellee cannot go along with such an argument. Judge Lemon has stated an adequate answer to this sort of thing in these words:

> "And it is the law that an instruction *must* be construed as a whole. A trial judge cannot be expected to cram all the limitations, qualifications, exceptions, and distinctions of a legal principle into one sentence or even into one paragraph. Judicial pronouncements, like every other type of human discourse, must be allowed some *elbow* room. Isolated excerpts are not to be considered apart from their context, and, so considered, are not to be tortured into constituting error."

Benatar vs. U. S., Supra, 743.

Appellant has also said that "nowhere in the instructions were the jury told that in order to find a verdict of guilty it was necessary for them to believe beyond a reasonable doubt that the defendants conspired to do intentional wrong." Appellee cannot go along with that statement either.

The obvious answer is in the instruction.

The following language from the instruction belies the conclusions of appellant, and is set forth for the convenience of the Court.

"Now conspiracy is a combination and agreement by two or more people to do something wrong. In this particular case, the matter has now been reduced to this charge, that these defendants conspired to defraud the United State Government.

"It is charged that they joined together in a mutual enterprise knowingly and criminally and with the full understanding on the part of each other of what they were doing; that they joined together in a scheme to get this Federal surplus property over here to Arizona and make personal use of it. Instead of allowing it to pursue the correct proper course of being distributed to the Arizona schools and school districts, the school system of Arizona." (T.R. 439) "The Government case hitches around these DP-2 forms. That was the form of application the Government devised for the handling of this surplus property for getting in into the hands of the state and there for distribution to the schools.

"The particular false statement which the Government claims was made in these DP-2 forms—I notice their language is different in some of them—but I think this language or something like it is in all of them: 'The property requested will be distributed to eligible educational institutions for educational purposes on the basis of need and utilization.'

"The Government charges in this case that was a false statement and, knowingly false, that Caywood signed or authorized to be signed, if you find that he did, that statement, knew that wasn't true; he knew he couldn't get the property unless he did sign it; but he knew he didn't intend to do that. He knew he didn't intend to distribute it or see it was distributed to educational institutions but diverted it for his

own profit along with the co-defendant. That is the Government's charge in this case. (T.R. 440)

"The other co-defendant was in that scheme with him. The other co-defendant's part was to get the money out of the property after it got here. It was Caywood's part to get the property over here and the other defendant's part to get something out the property after it got here. Later the money to be divided between them. That is the Government's theory in the case.

"Now I speak of conspiracy as defrauding the Government. That is the statute under which this indictment is brought. Here is what that means:

"Any improper interference with the United States Government in the discharge of its activities is deemed to be a fraud on the government. In other words, here the United States by statute was trying to do something for the Arizona schools and officials were trying to carry out their sworn duty to effectuate the object of the statutes. But that their functioning under that statute was interfered with improperly by defendant Caywood and collaborated in by the other defendant. In that they were not able to carry out that function that is the scheme or fraud on the Government.

"I may say to you here now I have talked with you so far about the Government's theory. In a criminal case, the defendant does not have to prove himself innocent. The Government has to prove him guilty. That is the way our law works. It has always been so in American history anyway. The Government has the burden of proof when it charges a man a criminal, the burden of proving him guilty. (T.R. 441)

"Every defendant is presumed to be innocent until proven guilty beyond a reasonable doubt. That is the burden of proof the Government must satisfy in its charge here for verdict of guilty." (T.R. 442)

It is not the Court's duty to overemphasize factors favorable to the defendant. *Butler vs. U. S., supra,* at page 564. The essential ingredients of conspiracy to defraud are all there and the law is correctly stated. In the language of Judge Allen: "Conspiring to defraud the United States is in itself inconsistent with an honest purpose." *Razete vs. U. S., supra,* at page 50.

SPECIFICATION OF ERROR No. V

Failure of the Court to define to the jury the substantive offense which the defendants are charged with conspiring to violate is reversible error.

Appellant contends that the Court did not explain the substance of 18 U.S.C. 1001, which, for the convenience of the Court, is set forth below:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Appellee admits that the law is well established that in a conspiracy to violate a statute the Court must instruct the jury as to the elements of the offense charged in the statute;

U. S. vs. Levy, 153 F. 2d 955

U. S. vs. Noble, 155 F. 2d 315

U. S. vs. Max, 156 F. 2d 13

U. S. vs. Yasbin, 159 F. 2d 705

U. S. vs. Ausmeier, 152 F. 2d 349, 356

U. S. vs. Pincourt, 159 F. 2d 917, 920

and it is also true that "in a criminal case the Court must instruct on all essential questions of law involved, whether or not it is requested to do so." "*Samuel vs. U. S.,* 169 F. 2d 787 at page 792, where further authority is also cited in support of the rule.

The law also is well established that on appeal the Court on its own initiative will take cognizance of fundamental error.

Screws vs. U. S., 326 U. S. 91, 107

U. S. vs. Atkinson, 297 U. S. 157, 160

Clyatt vs. U. S., 197 U. S. 207, 221, 222

Samuel vs. U. S., 9 Cir., Supra.

Appellant at page 8 in his brief sets forth the objection which the defendant Tompkins made to the instruction complained of. For the convenience of the Court they are set forth here as follows:

> "More specifically on those instructions and I especially relate to those that have to do with the falsity of the statements, the DP-2 forms, the charge of the Court did not encompass all of the predicates upon which the facts are to be applied to determine legally not only the falsity but the connection of the falsity to the defendant Tompkins and the same is true in connection with the Court's charge on the conspiracy itself and on the agreement * * *". (T.R. 448)

The defendant Caywood's exception consisted in joining in the above objection. Obviously that objection does not support the argument now made by appellant. No objection or criticism of the kind here raised on appeal was brought to the attention of the Trial Court. The error now assigned is at best an afterthought and, in no event can it be termed plain error and fall within

the contemplation of Rule 52(b) of the Rules of Criminal Procedure ~~for~~ FOR the District Courts.

It also appears that the exception comes within the sweep of Rule 30 of the Rules of Criminal Procedure and fails to meet the requirement of stating distinctly the matter to which he objects.

Appellant's seizure upon one word used by the Court, viz., "improper" does not support the argument that the jury were misled by that word into believing that there need be no intential wrongdoing on the part of the defendants. The answer, of course, lies in the complete instructions.

The Court did instruct on the subject of intent as pointed out in pages 16-20 in this brief.

Appellant admits that the jury was told in very general terms what the defendants were charged with doing, and that it was told: "They, (the defendants) are on trial for a conspiracy to make false statements and by that means to defraud the Government." This he says is insufficient because the elements of "knowingly and wilfully" were omitted.

The instructions given do not support appellant's argument. Appellee, for the convenience of the Court, sets forth below the instructions given on this subject.

> "The Government charges in this case that was a false statement (DP-2 applications) and, knowingly false, that Caywood signed or authorized to be signed, if you find that he did, that statement, knew that wasn't true; he knew he couldn't get the property unless he did sign it; * * * * (T.R. 440)
>
> "Let me come back briefly to the discussion of conspiracy so that you will have clearly in mind the distinction between the conspiracy charge and the charge that the defendants did what we call a substantive wrong. * * * It is charged they conspired to

defraud the Government by making these false applications, that Caywood made them; Tompkins was in on the deal and knew it was going to be done, had to be done, as a matter of fact, to carry out the scheme." (T.R. 444).

"* * * They are on trial for a conspiracy to make false statements and by that means to defraud the Government." (T.R. 445).

The defendant Tompkins requested the following instruction found at page 60 of the Transcript of Record:

"Before it can be said that a, or any DP-2 form, was a 'false' statement or representation, the burden is upon the prosecution to prove beyond a reasonable doubt that at the time the DP-2 form was filed it was intentionally, deliberately and wilfully untrue, and was then and there known to be thus untrue by the person who filed the DP-2 form."

The exception taken by the defendant Tompkins and joined in by the defendant Caywood for failure to give the above instruction is found at page 447 in the Transcript of Record:

"That the proposition is on the fact and on the matter in evidence. Each of those instructions state a proposition at law which is germane to the issues and is essential for a jury to be thus instructed in order that they may have a proper grasp and understanding of the fact and to understand in what relation to the charge those facts have held significance and held efficacy."

To say that the instruction given differs from the one requested is to indulge in "hair splitting." To say that the Court need do more than he did is to ignore *Moyer vs. U. S.*, 78 F. 2d 624, which appellant cites in his brief. In the *Moyer* case (supra) the Court did not read the statute alleged to be violated by the conspirators. Nor did the Court specifically refer to the statute involved. The Court stated at page 626:

> "While generally it may be said to be the better practice to instruct the jury respecting the provisions of the statute or statutes which the purpose of the conspiracy is to violate, it is sufficient if the essential facts constituting the conspiracy charge are stated."

The Trial Court there did precisely what the Trial Court did in the case at hand. It stated the essential facts constituting the conspiracy charge. That is what appellant has complained about all through his brief. The Court was, in the language of Justice Jackson, trying to set his instructions "in a practical frame and viewed with an eye to all the circumstances of the proceeding." *Sealfon vs. U. S.,* 332 U. S. 575, 579.

With respect to the requested instruction set forth above the rule is well established that the Court need not give a requested instruction "if the matter to which it refers has been fairly and adequately covered in the instruction given." *Berenbeim vs. U. S.,* 164 F 2d 679, 684.

We therefore, submit that there is no merit to any of the appellant's Specifications of Error, and judgment of the District Court should be affirmed.

Respectfully Submitted,

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APPENDIX

INTERNATIONAL HARVESTER TRACTOR REFERRED TO IN OVERT ACTS 5-8 IN THE INDICTMENT

This tractor is identified in Govt. Ex. 1-d, which consists of a DP-2 application and accompanying papers. It is further identified in Govt. Ex. 36. The bill of lading addressed to the Arizona State Educational Agency and the freight bill for this shipment to Arizona from the Government installation was paid for by check signed by the defendant Caywood, Govt. Ex. 12. A man named Johnson sold this tractor to a Mr. Tomison for $6,878.55 (T.R. 315, 316). A check in that amount was given to the defendant Tompkins, Govt. Ex. 89 and he endorsed it over to Cox & Cox (T,R. 316) the law firm in which the defendant's brother-in-law was a member. The defendant Tompkins also gave a bill of sale, and his signature was acknowledged by his brother-in-law, above referred to, Govt. Ex. 90.

INTERNATIONAL HARVESTER TRACTOR REFERRED TO IN OVERT ACTS 9-12 IN THE INDICTMENT

This tractor is identified in Govt. Ex. 1-d, which consists of a DP-2 application and accompanying papers. It was shipped to the Prisoner of War Camp at Florence, Arizona as disclosed by the freight bill, Govt. Ex. 12. Also in that Exhibit is the check signed by Caywood paying the freight bill. This tractor was brought by truck from Florence, Arizona, to the State Tractor & Equipment Company (T.R. 246, 247) where it was repaired (T.R. 262) Govt. Exs. 61, 62. It was later sold for $9,536.70 (T.R. 317) Govt. Ex. 88, and a cashier's check was purchased and given to the defendant Tompkins (T.R. 310) Govt. Ex. 87.

INTERNATIONAL HARVESTER TRACTOR REFERRED TO IN OVERT ACTS 13-16 IN THE INDICTMENT

This property is also identified in Govt. Ex. 1-d, which consists of a DP-2 application and accompanying papers. It was shipped to the Prisoner of War Camp at Florence, Arizona, and was picked up there and hauled to State Tractor & Equipment Company, Phoenix, Arizona (T.R. 247) where it was repaired (T.R. 263) Govt. Exs. 63 and 64. It was then sold for the sum of $8,532.47 (T.R. 307, 319). A check in that amount was given to a man named Johnson, who made the sale for the defendants, Govt. Ex. 86, and he in turn cashed the check, took out his commission and give the balance to the defendant Tompkins (T.R. 307).

NORTHWEST SHOVEL REFERRED TO IN OVERT ACTS 17-21 IN THE INDICTMENT

This shovel is identified in Govt. Ex. 1-e, which comprises a DP-2 application and accompanying papers. It was shipped to the Prisoner of War Camp at Florence, Arizona as disclosed by the bill of lading, Govt. Ex. 11, and the freight bill was paid by a check signed by the defendant Caywood, Govt. Ex. 12, and a memorandum presumably in the hand of the defendant Caywood was found in that Exhibit marked "OK—C.W.C." It was moved from Florence, Arizona to the State Tractor & Equipment Company at Phoenix, Arizona for sale (T.R. 266). It was also repaired there (T.R. 267). The State Tractor & Equipment Company sold this shovel (T.R. 266, 267) to the City of Flagstaff, Arizona for the sum of $12,812.00, Govt. Ex. 68. The defendant Tompkins received two checks from the State Tractor & Equipment Company, one in the sum of $1,175.61, Govt. Ex. 69, and the other in the sum of $5,941.25, Govt. Ex. 71 (T.R. 267,268).

NORTHWEST SHOVEL REFERRED TO IN OVERT ACTS 22-25 IN THE INDICTMENT

This shovel is identified in Govt. Ex. 1-e, which consists of a DP-2 application and accompanying papers. It is further identified in the bill of lading, Govt. Ex. 11 which disclosed that it was shipped to the Prisoner of War Camp, Florence, Arizona. It was later sold by the State Tractor & Equipment Company to San Xavier Rock & Sand Company for $9,000.00 (T.R. 269, 270) and the defendant Tompkins received a check for $6,500.00 (T.R. 269, 270) Govt. Ex. 72, which he endorsed over to Cox, Lockwood & Cox, the law firm of his brother-in-law.

MISCELLANEOUS TRACTOR PARTS REFERRED TO IN OVERT ACTS 26-34 IN THE INDICTMENT

These parts are identified in Govt. Ex. 1-b, which is a DP-2 application and accompanying papers. The defendant Caywood in the company of the defendant Tompkins discussed the sale of these parts with Government witness Haggard, the uncle of the defendant Tompkins, who was employed at the State Tractor & Equipment Company (T.R. 218, 219). Haggard first saw these parts on a storage lot near the Phoenix Airport (T.R. 218) and later inspected them when they were uncrated on the defendant Tompkins' ranch (T.R. 219). When the Government witness Haggard was talking with the two defendants at the storage lot near the Phoenix Airport he was admonished by one of the defendants not to talk too loud for the obvious reason that workmen who were nearby might overhear the conversation. Most of these parts were new (T.R. 220) and some of them were purchased by the State Tractor & Equipment Company for the sum of $3,000.00. Govt. Ex. 47 is the check from the State

Tractor & Equipment Company to the defendant Tompkins, which he endorsed over to Z. Simpson Cox, his brother-in-law (T.R. 342). This property is further identified in Govt. Exs. 38, 39, 40 and 41 which are the shipping orders, invoices, receipts and bills of lading pertaining thereto.

SCHRAMM GENERATING SET AND VULCANIZING MOLD REFERRED TO IN THE INDICTMENT AS OVERT ACTS 36-39

This equipment is identified in Govt. Ex. 1-e, which is a DP-2 application and accompanying papers. This equipment was sold by a man by the name of Johnson on behalf of the defendants to General Tire Company of Phoenix, Arizona. A check was given by the General Tire Company of Phoenix to Harry C. Tompkins in the sum of $1,000.00, Govt. Ex. 91. Harry C. Tompkins also gave a bill of sale identified under the same Exhibit number (T.R. 320).

ROAD GRADER NOT ALLEGED IN THE INDICTMENT

This piece of equipment is identified in Govt. Ex. 1-a, which is a DP-2 application and accompanying papers. It is identified by a photograph, Govt. Ex. 44. It was sold by the State Tractor & Equipment Company to a man by the name of Franklin D. Cox (T.R. 223, 224, 237). A bill of sale was given by the defendant Tompkins, Govt. Ex. 46. The equipment was paid for by a check, Govt. Ex. 45 in the amount of $1,150.00. State Tractor & Equipment Company gave its check to Harry Tompkins in the sum of $1,150.00, Govt. Ex. 76, and the check was deposited to the account of Cox, Lockwood & Lockwood, Z. Simpson Cox, a mem-

ber thereof, being a brother-in-law of the defendant Harry Tompkins. This piece of equipment is further identified in Govt. Ex. 10, a freight bill and the check signed by Caywood paying said bill.